the Church's views on the issue. As such, it was special interest legislation, with a nagging establishment of religion undertone.'"[1]

On November 1, 1961, in direct defiance of the Connecticut law, Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Charles Lee Buxton, a physician and professor at the Yale University Medical School, defiantly opened a birth control clinic in New Haven with the goal of providing unlawful birth control advice and contraceptives to married women. Griswold and Buxton were promptly arrested, tried, and convicted for violating the Connecticut law. They maintained that the statute was unconstitutional. The state courts rejected the argument out of hand, concluding that nothing in the Constitution guarantees a right to distribute or to use contraceptives.[12]

In a groundbreaking decision, the Supreme Court of the United States held in *Griswold v. Connecticut*[13] that the Connecticut statute violated the United States Constitution.

THE SUPREME COURT had addressed related issues in the past. In *Buck v. Bell,*[14] for example, the Court confronted the question of compelled sterilization. Carrie Buck, "a feebleminded white woman," was committed to the Virginia State Colony for Epileptics and Feebleminded. Buck was the daughter of a feebleminded mother in the same institution, and the mother of an illegitimate feebleminded child. In 1924, when she was eighteen years old, she was ordered to be sterilized under the authority of a Virginia statute authorizing the sterilization of "defective" individuals with "hereditary" mental conditions who could "safely" be discharged from confinement only if they were incapable of having offspring. *

The question presented to the Supreme Court was whether such compelled sterilization violated the Constitution. In an opinion by Justice Oliver Wendell Holmes, the Court rejected Buck's claim that her compulsory sterilization violated her right not to be deprived of "liberty . . . without due process of law." In light of the state's findings that Buck was "the probable potential parent of socially inadequate offspring, likewise afflicted," that she could "be sexually sterilized without detriment to her general health," and that "her welfare and that of society" would be "promoted by her steriliza

---

• Many scholars believe that Buck was not "feebleminded" but, like many women at the time, was deemed such because she was guilty of promiscuity for having a child out of wedlock.

-tion," the Court held that there could be no constitutional objection to the procedure.

In dismissing Carrie Buck's argument, Holmes analogized compulsory sterilization to compulsory vaccination, the constitutionality of which the Court had upheld twenty years earlier in *Jacobson v. Massachusetts.*[15] Holmes reasoned that if the state can compel an individual to be vaccinated in order to prevent the spread of smallpox, then it can also compel an individual to be sterilized to prevent the spread of "imbeciles." "Three generations of imbeciles," Holmes concluded, "are enough."*[16]

THE SUPREME COURT next confronted the issue of compelled sterilization in its 1942 decision in *Skinner v. Oklahoma.*[17] By this time, in light of events in Nazi Germany, government compelled sterilization was viewed with greater concern. *Skinner* involved the constitutionality of Oklahoma's Habitual Criminal Sterilization Act, which defined as a "habitual criminal" any person who was convicted three or more times off felonies "involving moral turpitude." The Act, which was a eugenics measure designed to weed habitual criminals out of the gene pool, provided that such persons could be sterilized upon a jury finding that they could "be rendered sexually sterile without detriment" to their general health. The Act specified that certain felonies, such as embezzlement and "political offenses," were not to be considered crimes of moral turpitude.[18]

Jack T. Skinner, a resident of one of the most impoverished Dust Bowl states in the nation, was convicted in 1926 for stealing chickens, and then in 1929 and 1934 for robbery with firearms. The Oklahoma attorney general instituted proceedings to have Skinner sterilized. Skinner maintained that such compulsory sterilization violated his rights under the Constitution. The Supreme Court unanimously agreed.

Justice William 0. Douglas authored the opinion of the Court. A brilliant, but often idiosyncratic, jurist, and a committed civil libertarian, Douglas had been appointed to the Court by President Franklin Roosevelt three years earlier at the age of forty, making him one of the youngest justices in American history. Throughout his career, Douglas was a power

* Before *Buck* reached the Supreme Court, most lower courts had found such laws unconstitutional. In time, Holmes's opinion in *Buck* would come to be regarded as one of his greatest failures as a justice.

-ful voice for individual freedom, as illustrated by his stance on the issue of obscenity.

Dougla began his opinion in *Sk inner* by noting that "this case touches a sensitive and important area of human rights" because Oklahoma deprives certain individuals of a right which is "basic to the perpetuation of a race the right to have offspring." Douglas reasoned that the Oklahoma statute violated the Equal Protection Clause of the Fourteenth Amendment' because its classification of crimes as either manifesting or not manifesting "moral turpitude" made little sense. As Douglas observed, a person who

* NO State shall ... deny to any person ...the equal Protection of the laws."

stole chickens three times could be sterilized under the law, but a person who embezzled three times or who accepted political bribes three times could not be sterilized. Although conceding that states generally have broad latitude to treat different crimes differently in terms of sentencing, Douglas insisted that this case was different because compulsory sterilization infringes on "one of the basic civil rights of man." Marriage and procreation, he observed, "are fundamental to the very existence and survival of the race," and if the state exercises the power to sterilize "there is no redemption for the individual whom the law touches." Such an individual has suffered an "irreparable" injury and "is forever deprived of a basic liberty."[19]

Douglas explained that because the law created an inequality among individuals that affected this fundamental liberty, the distinctions embedded in the statute could not be upheld merely because they might be "rational." Although this was the usual standard under the Equal Protection Clause for reviewing the constitutionality of laws treating some criminal offenses differently than others, Douglas concluded that in this case the challenged law must be subjected to "strict scrutiny" because the specific penalty imposed touched upon a fundamental right.[20] Thus, in *Skinner,* the Court held for the first time that laws that infringe the implied fundamental right to procreate are especially problematic under the Constitution.

NINETEEN YEARS later, in *Poe v. Ullman,21* which was decided in 1961, several plaintiffs brought a test case to challenge the constitutionality of the same Connecticut statute that would later confront the Court in *Griswold.* Pauline Poe, a married woman with no children, had had three consecutive pregnancies ending in infants with multiple congenital abnormalities from which each had died shortly after birth. A well regarded physician in Connecticut advised Mr. and Mrs. Poe that the cause of the infants' abnormalities was genetic and that any further pregnancies would likely end the same way. The physician advised them to use contraception, but because of the Connecticut law he could not recommend or prescribe any contraceptive device or medication. Mr. and Mrs. Poe and their physician sued the Connecticut attorney general to challenge the constitutionality of the law.[22]

When the case reached the Supreme Court, the Court decided not to decide the case. In the view of Justice Felix Frankfurter, who wrote the lead opinion, because none of the individuals involved had actually been prosecuted for violating the Connecticut statute, there was no dispute to

be resolved. The Court therefore dismissed the case without reaching the merits of the claim.

What is memorable about *Poe* is not the Court's disposition of the cas but the fact that all three justices who reached the merits of the issue concluded that the Comstock era law could not be squared with the Constitution. In reaching this conclusion, Justice John Marshall Harlan, an always thoughtful and moderately conservative Justice appointed by President Dwight Eisenhower, began by observing that a statute making it a criminal offense for married couples to use contraceptives is "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." The Constitution, he reasoned, protects not only those rights that are expressly specified in the Constitution but all "rights 'which are ... fundamental; which belong ... to the citizens of'

all free governrnents.'"23

Harlan then maintained that because the Connecticut statute deprived individuals of "a substantial measure of liberty in carrying on the most intimate of all personal relationships," the state could not constitutionally defend the law on the mere ground that it promoted "the moral welfare of its citizenry." Rather, invoking *Skinner,* Harlan insisted that when a law intrudes so deeply into "a most fundamental aspect of 'liberty,'" it must be deemed unconstitutional unless the state can demonstrate that the law is necessary to further a compelling state interest. Under that standard, Harlan concluded that the Connecticut statute was clearly invalid.*[24]

THE RIGHT TO "MARITAL PRIVACY"

THIS, THEN, WAS the background to *Griswold.* It was to avoid the outcome in *Poe* that Estelle Griswold openly established the Planned Parenthood clinic, arranged for contraceptives to be publicly dispensed to married couples, and intentionally invited her arrest, prosecution, and conviction. Because the Supreme Court now had an actual conviction before it, it could not evade the constitutional issue.25 In a landmark seven to two decisions, the justices held the Connecticut anticontraception law unconstitutional as applied to married couples.

Justice Douglas, who had authored the decision on Skinner more than two decades earlier, and who had once explained his judicial philosophy

---

• Justices William Douglas and Potter Stewart also dissented.

asserting that the Constitution "was designed to take the government off the backs of the people," wrote the opinion of the Court. Douglas began by conceding that the Supreme Court does "not sit as a super legislature to determine the wisdom, need, and propriety of laws." But this case, he maintained, was different, because the Connecticut law "operates directly on an intimate relation of husband and wife."

Douglas observed that over the years, the Court had often protected constitutional rights that were not expressly mentioned in the Constitution, including the right of association, the right to educate a child in a school of the parents' choice, the right to study a foreign language, the right to read, and the freedom of thought.[26] Douglas reasoned that, as those decisions implied, the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Moreover, he added, many of those guarantees are designed to safeguard the most fundamental "privacies of life." This understanding of the Constitution, he argued, was "evident in the text of the Ninth Amendment."

Douglas therefore concluded that the Connecticut law, by invading the most private intimacies of the marriage relationship, infringed "a right of privacy older than the Bill of Rights." Without deciding whether the state could constitutionally regulate the manufacture or sale of contraceptives generally, or could prohibit their use by unmarried persons, Douglas held that a law forbidding *married* couples to use contraceptives could not be squared with the constitutional right of marital privacy.[27]

IN AN influential concurring opinion, Justice Arthur Goldberg, joined by Chief Justice Earl Warren and justice William Brennan, emphasized the importance of the Ninth Amendment. Goldberg explained that the Ninth Amendment was designed to quiet "fears" that a list of specifically enumerated rights might later be interpreted as implying that other rights were not protected by the Constitution. It was therefore adopted in order to make clear that "the Framers did not intend" that the list of specifically enumerated rights should "be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."

Goldberg added that "in determining which rights are fundamental" for purposes of the Ninth Amendment, judges "must look to the 'traditions and [collective] conscience of our people." The proper inquiry, he explained, is whether the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which

lie at the base of all our civil and political institutions.'" Applying this test, Goldberg concluded that "the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights" that are expressly enumerated in the Constitution.[28]

Justice Hugo Black, joined by Justice Potter Stewart, dissented. On a range of constitutional issues, especially those dealing with the freedom of speech, Black was regarded as a rock ribbed liberal. But he rooted his liberalism in a strongly literalist interpretation of the Constitution. Thus, he could not agree that "the evil qualities" of the Connecticut law were sufficient to render it unconstitutional. Black chastised the Court for talking "about a constitutional 'right of privacy' as though there is some constitutional provision ... forbidding any law ever to be passed which might abridge the 'privacy' of individuals," when "there is not." In short, in Black's view, nothing in the text of the Constitution expressly addressed this issue, and that was the end of the matter.[29]

GRISWOLD WAS a daring decision. The Court dismissed the traditional view that a state's moral judgments about sex must override personal interests in marital intimacy. The public response to *Griswold* was quite positive. Even the Catholic leadership was muted in its reaction. The nation's foremost Catholic theologian, John Courtney Murray, wrote a widely read memo to Boston's Richard Cardinal Cushing in which he argued against the Church's position on contraception, and the liberal Catholic magazine *Commonweal* went so far as to praise the *Griswold* decision as "long overdue."[30] According to a Gallup poll taken shortly after the decision, more than 80 percent of all Americans, and 78 percent of all Catholics, now supported the wider availability of birth control.

At the same time, the "sexual revolution" of the 1960s reinforced the argument that access to contraception was an essential component of the "right" to sexual freedom, and the rise of the women's movement made the availability of contraceptives more than ever an issue of women's rights. In increasing numbers, women now claimed reproductive control as a fundamental right, as they vigorously entered the public discourse to share their stories, condemn what they saw as their sexual oppression, and demand social and legal change.[31]

Growing public support for the legalization of contraceptives embold-

-ened legislators in several states to reconsider their Comstock era laws. New York, Ohio, Minnesota, and Missouri, for example, repealed their laws prohibiting the sale or distribution of contraceptives. Efforts to overturn the federal Comstock law repeatedly failed in Congress, however, until Republican Senator George H. W. Bush introduced a bill in 1969, twenty years before he became president, to remove contraceptives and information about contraceptives from the 1873 law. The federal repeal bill was finally signed into law by President Richard Nixon on January 8, 1971.32

A central question posed by some of these liberalizing laws was whether contraceptives should be legal not only for married couples, but for *unmarried* persons as well. Opponents of extending access to contraceptives to unmarried persons insisted that such a policy would encourage premarital sex, extramarital sex, and other forms of immoral behavior. From a constitutional perspective, this posed an interesting dilemma. The constitutional right that the Supreme Court had recognized in *Griswold* was grounded in the privacy of the marriage relation. By definition, that right did not extend to unmarried individuals. How the Supreme Court would resolve that issue was an open and potentially perplexing question.33

WHETHER "TO BEAR OR BEGET A CHILD"

IN 1879, MASSACHUSETTS enacted its version of the Comstock Act, making it a crime for any person to sell, distribute, or give away any drug, medicine, instrument, or device "for the prevention of conception."[34] For decades, birth control supporters attempted to persuade the Massachusetts legislature to repeal or at least amend this law, but their efforts were always in vain. Massachusetts was a heavily Catholic state, and elected officials were not about to buck the Church.

After the Supreme Court's decision in *Griswold,* however, and after a prolonged legislative and political battle, Massachusetts finally repealed its Comstock era law and enacted a new "reform" statute that allowed married persons to obtain contraceptives. The new law still made it a felony, however, punishable by up to five years in prison, for any person, including a licensed physician or pharmacist, to sell, prescribe, give away, or distribute "any drug, medicine, instrument or article whatever for the prevention of conception" to any *unmarried* person.[35]

The new law was a hard bought compromise that was grudgingly accepted by the state's Catholic leaders only because it forbade any distri-